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Nos. 14-556, 14-562, 14-571 & 14-574

IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICUS CURIAE* EXPERIENTIAL LEARNING LAB AT NEW YORK UNIVERSITY SCHOOL OF LAW IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Since its founding, our country has aspired to respect the dignity and liberty of all people.[2] We floundered at our birth as we tried to reconcile principles of equal dignity with laws that supported human enslavement. The contradictions between respect for human dignity and protection of the rights of some to own and control others plunged us into Civil War. At the end of that war, we reconstructed our Constitution to make the blessings of democratic liberty secure for all of our people.

We are students and scholars[3] with an interest in assuring that the enlightened heritage of emancipation guides interpretation of our reconstructed Constitution.

SUMMARY OF ARGUMENT

Little more than a decade after the Fourteenth Amendment reconstructed our federal system, this

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. The parties have consented to the filing of amici curiae briefs.

[2] The Declaration of Independence para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); *see also* Danielle Allen, Our Declaration: A Reading of the Declaration of Independence in Defense of Equality 268-269 (2014) ("Equality is the foundation of freedom because from a commitment to equality emerges the people itself—we, the people—with the power . . . to create a shared world in which all can flourish. . . .").

[3] This brief was a project of the Experiential Learning Lab at New York University School of Law and is submitted in its name as Amicus Curiae. The names of contributors are attached as an Appendix.

Court described marriage as "a thing of common right."[4] The Court has subsequently affirmed the right to marry as fundamental to democratic liberty.[5] In doing so, the Court has upheld a principle that was avowed by the Founders,[6] deepened by the experience of slavery, and formalized by the Fourteenth Amendment's charter of freedom.

Many have expressed concern that because marriage rights are "unenumerated" their constitutional grounding is uncertain.[7] A judge in one of the cases below seemed to express this concern when he said that "[n]obody . . . understood [the Fourteenth Amendment] to require the States to change the definition of marriage."[8] We write to answer concerns about the constitutional grounding of marriage rights

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[4] *Meister v. Moore*, 96 U.S. 76, 79 (1877).

[5] *See Turner v. Safley*, 482 U.S. 78, 96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

[6] *See generally* Steven G. Calabresi & Hannah Begley, Originalism and Same Sex Marriage (2014) (unpublished) (on file with authors) (providing an originalist argument in support of same-sex marriage).

[7] *See United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Scalia, J., dissenting) ("[T]he Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol."); *see also Bostic v. Schaefer*, 760 F.3d 352, 389 (4th Cir. 2014) (Niemeyer, J., dissenting) ("The Constitution contains no language directly protecting the right to same-sex marriage or even traditional marriage"); *Kitchen v. Herbert*, 755 F.3d 1193, 1230 (10th Cir. 2014) (Kelly, J., dissenting) ("The Constitution is silent on the regulation of marriage; accordingly, that power is reserved to the States, albeit consistent with federal constitutional guarantees.").

[8] *DeBoer v. Snyder*, 772 F.3d 388, 403 (6th Cir. 2014).

and to establish that a broadening of state definitions of marriage was immediately understood to be necessary upon ratification of the Fourteenth Amendment.

As students and heirs of antislavery traditions, we argue that unjustified denials of the right of family recognition violate the privileges we hold under the Fourteenth Amendment's Citizenship Clause and the Liberty we are guaranteed under its Due Process Clause.

We embrace, but do not repeat here, Petitioners' argument that to deny recognition of same sex marriages is to deny the equal protection of the laws. Similarily, we embrace, but do not repeat here, Petitioners' argument that there is no legitimate justification for denying same-sex marriage recognition. Our focus is on the constitutional need to give skeptical scrutiny to a state's failure to honor a couple's commitment to marry.

In what follows, we demonstrate that the Fourteenth Amendment's Citizenship, Privileges or Immunities, and Due Process Clauses were designed and rightfully understood in the postbellum period to encompass rights of family recognition. We make that demonstration first with reference to popular understandings of what it meant to repudiate slavery and eliminate its defining constraints, then with reference to the statements of Reconstruction lawmakers, and finally with documentation that the right of family recognition was in every state presumed to have been assured by passage of the Thirteenth and Fourteenth Amendments.

Our argument is not simply that slavery teaches the importance of family recognition or the hurtfulness of its denial. Our argument is that our ancestors

understood the inalienability of rights of family recognition through the experience of slavery and secured those rights when they drafted and ratified the Thirteenth and Fourteenth Amendments.

ARGUMENT

The Fourteenth Amendment restructured the relationship between the Federal Government and the States to ensure protection of human liberty after the abolition of slavery. This establishment of federally guaranteed civic freedom "represented a radical change in the nature of American public life."[9] As Justice Field explained in his *Slaughterhouse* dissent, "[t]he fundamental rights, privileges, and immunities which belong to . . . free people and free citizens, now belong to all as . . . citizen[s] of the United States. . . . They do not derive their existence from . . . [state] legislation, and can not be destroyed by . . . [state] power."[10] Nationalization of fundamental rights was necessary, for, as Justice Thomas has observed, "liberty would be assured little protection if [the Fourteenth Amendment] left each state to decide which privileges or immunities of United States citizenship it would protect."[11] Emancipation, Reconstruction, and the explicit conferral of United States citizenship brought to every person born or naturalized in our nation a bundle of federally protected rights that are appropriately understood as privileges

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[9] Eric Foner, *The Supreme Court and the History of Reconstruction-and Vice-Versa*, 112 Colum. L. Rev. 1585, 1586 (2012).

[10] *Slaughter-House Cases*, 16 Wall 36, 95–96 (1873) (Field, J., dissenting).

[11] *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 834-35 (2010) (Thomas, J., concurring).

of citizenship,[12] but have more often been recognized by this Court as aspects of the liberty guaranteed by the Due Process Clauses.[13] Over a century of constitutional deliberation, we have come to understand "the respect the Constitution demands for the autonomy of the person" in making "decisions relating to marriage, procreation, contraception, family relationships, child rearing and education."[14] This evolved understanding of free and autonomous citizenship should not surprise us. It is a predictable result of our experience and repudiation of slavery.

Slavery has been described by one of its most thoughtful and learned students as social death.[15] The social death of slaves resulted from three overlapping factors: degradation, powerlessness and

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[12] The *Slaughter-House* Court's narrower interpretation of the Privileges or Immunities Clause has been roundly criticized. *See generally, e.g.*, Akhil R. Amar, The Bill of Rights: Creation and Reconstruction (1998); Akhil R. Amar, *Substance and Method in the Year 2000*, 28 Pepperdine L. Rev. 601, 631, n.178 (2001) ("Virtually no serious modern scholar—left, right, and center—thinks that this [interpretation] is a plausible reading of the Amendment."); James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote* Shelby County v. Holder, 8 Harv. L. & Pol'y Rev. 39, 42 & n.19 (2014) ("There is, in fact, a growing 'academic consensus [that] Slaughter-House was wrong . . . .'").

[13] Since the Fourteenth Amendment's ratification, the "liberty" protected by its Due Process Clause has been understood by this Court as "something more than freedom from the enslavement of the body or from physical restraint." *Taylor v. Beckham*, 178 U.S. 548, 602 (1900); *see also, e.g.*, *Munn v. Illinois*, 94 U.S. 113, 142 (1876); *Powell v. Pennsylvania*, 127 U.S. 678, 691 (1888).

[14] *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

[15] *See generally* Orlando Patterson, Slavery and Social Death (1982).

"natal alienation."[16] Natal alienation is the outsider status that results when a society refuses to recognize one's kin or kind. It was a defining feature of enslavement:

> American slaves, like their ancient Greco-Roman counterparts, had regular sexual unions, but such unions were never recognized as marriages; . . . both sets of parents were deeply attached to their children, but the parental bond had no social support.[17]

Natal alienation is also a defining feature of the status your Petitioners endure. For example, although Petitioners April DeBoer and Jayne Rowse are life partners raising three children together, Rowse is the legal guardian of two children, and DeBoer is the legal guardian of only one.[18] The laws of Michigan do not allow DeBoer and Rowse to marry, nor do they allow two unmarried people to adopt the same child.[19] The children's parental ties could be broken on the death or incapacity of either of their parents. In Rowse's words, "in Michigan, we're legal strangers. . . . A judge could give our kids to anybody."[20]

As we shall show, the American people, the United States Congress, and the courts and legislators of the reconstructed states appreciated the profound social

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[16] Orlando Patterson, Freedom in the Making of Western Culture 77–78 (1991).

[17] Orlando Patterson, Slavery and Social Death 6 (1982).

[18] *DeBoer v. Snyder*, 772 F.3d 388, 423 (6th Cir. 2014).

[19] *Id.*

[20] Richard Wolf, *Michigan couple poised to make gay marriage history*, USA Today (Jan. 16, 2015, 5:33 pm), http://www.usatoday.com/story/news/2015/01/15/supreme-court-gay-marriage-michigan/21768849/.

isolation of natal alientation. They understood family recognition as an essential component of democratic freedom.

I. REPUDIATION OF SLAVERY AND THE CONSTITUTIONALIZATION OF UNIVERSAL FREEDOM WERE MOTIVATED BY ABHORRENCE OF SLAVERY'S DENIAL OF FAMILY RECOGNITION

The laws of every slave-holding state made it impossible for a slave to enter a legally binding marriage,[21] and the laws of every slave-holding state permitted the separation, by sale or otherwise, of slaves who considered themselves married.[22] The categorical exclusion of slaves and former slaves from this aspect of civic life was generally undisputed.[23] It was said to arise out of slaves' incapacity to make contracts and the "incompatability" of the duties and obligations of marriage with "the relation of slavery."[24]

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[21] Darlene C. Goring, *The History of Slave Marriage in the United States*, 39 J. Marshall L. Rev. 299, 303-04 (2006).

[22] Thomas R.R. Cobb, An Inquiry Into the Law of Negro Slavery in the United States of America x (1858); Orlando Patterson, Slavery and Social Death: A Comparative Study 189 (1982) ("Throughout the modern Americas the union of slaves and the integrity of their households rarely received legal sanction.").

[23] Although Tennessee recognized that slaves had a limited right to marry, the benefits and obligations of slave marriages did not rise to the level of formal, civic marriage. *Andrews v. Page*, 50 Tenn. 653, 666 (1870) ("We do not hold that [slaves'] marriages were followed by all the legal consequences, resulting from the marriage of white persons.").

[24] *Id.* at 660; *see also Scott v. Raub*, 14 S.E. 178, 179 (Va. 1891) ("It was an inflexible rule of the law of African slavery, wherever it existed, that the slave was incapable of entering into any contract, not excepting the contract of marriage.") (quoting *Hall*

Henry Bibb, an American slave, provided a first-hand account of the legal and social situation that ensued. Bibb described the process by which he and his "wife" were "married" by clasping hands, pledging to be true, and calling "on high heaven to witness the rectitude of [their] purpose."[25] Bibb wrote in 1850 that no more binding ceremony was available, "for marriage among American slaves is disregarded by the laws of this country."[26] Bibb's marriage was disrupted when he was sold to a distant master. It

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v. United States, 92 U.S. 27, 30 (1875)); *Johnson v. Johnson*, 45 Mo. 595, 598 (1870) ("Persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery, as the one can not be discharged nor the other be recognized without doing violence to the rights of the owner." (quoting *Malinda v. Gardner*, 24 Ala. 719, 727 (1854)); *Jennings v. Webb*, 8 App. D.C. 43, 53 (1896) ("That the legal relation of husband and wife could not exist among slaves, was not an arbitrary rule, prompted by a spirit of cruelty and oppression, but a necessary condition of the institution of slavery whilst it existed. Slaves could make no contracts, own no property; they were themselves property. The recognition of duties, obligations and rights of the legal relation of husband and wife was necessarily incompatible with those conditions.").

[25] Henry Bibb, Narrative of the Life and Adventures of Henry Bibb, an American Slave 38 (3d ed. 1969) (1850).

[26] *Id.* at 38. A former slave interviewed in the 1930s described the process more simply: "When they got married on the places, mostly they just jumped over a broom and that made 'em married. Sometimes one the white folks read a little out of the Scriptures to 'em, and they felt more married." B.A. Botkin, Lay My Burden Down: A Folk History of Slavery 86 (1989). For a description of slave marriage rituals and suggestions concerning their origins, see Herbert G. Gutman, The Black Family in Slavery and Freedom 1750-1925, at 273-81 (1976).

ended years later when he learned that his wife was the mistress of a slaveowner and mother of several of the slaveowner's children. Stories like that of Henry Bibb were common and notorious in the mid-nineteenth century. Herbert Gutman's comprehensive analysis of the slave family probes "[t]he best available evidence – that reported by Mississippi and northern Louisiana ex-slaves [to Union Army clergy registering marriages] – [and] discloses that about one in six (or seven) slave marriages were [*sic*] ended by force or sale. . . ."[27]

The importance of family independence and integrity and the devastating effects of slavery upon the African-American family were paramount themes of the antislavery movement. Harriet Beecher Stowe wrote in 1853 that "[t]he worst abuse of the system of slavery is its outrage upon the family; and . . . it is one which is more notorious and undeniable than any other."[28] An essay on the family appearing in *The Liberator* in 1837 declared: "the most appalling feature of our slave system is, the annihilation of the family institution."[29] William Goodell's treatise on slave law was published by the American and Foreign Anti-Slavery Society to "test the moral character of American slaveholding" by exhibiting statutes

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[27] Gutman, *supra* note 25, at 318.

[28] Harriet Beecher Stowe, A Key to Uncle Tom's Cabin 133 (1853). Stowe writes in response to charges that family separations depicted in Uncle Tom's Cabin were unrealistic or atypical. Her evidence of the prevalence of slave family disruption includes eye-witness accounts of family separations resulting from slave auctions, *id.* at 137, and advertisements for the sale of slaves in South Carolina, *id.* at 134-36, 138-42.

[29] William Wells, *Family Government*, The Liberator 192 (Dec. 1, 1837).

governing American slavery and documenting their effects.[30] To make vivid the effects of laws governing the slave family, Goodell supplemented his legal treatise with anecdotal accounts of families separated by sale and distanced by the demands of servitude, and with a collection of advertisements from Southern newspapers offering rewards for the capture or killing of slaves reported to have run away attempting to rejoin their families.[31]

Slaves did, of course, run away to reunite their families, and free antislavery advocates maintained an Underground Railroad in part to facilitate family reunifications.[32] Moreover, slaves and other antislavery advocates consistently undergirded the demand for release from bondage with the argument that rights of marriage and family were necessary to fulfillment of religious and moral duty and therefore inalienable.[33] To be recognized as human was to be recognized as morally autonomous, and moral and religious autonomy required *family* autonomy. As early as 1773, slaves claiming "a natural right to

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[30] William Goodell, The American Slave Code in Theory and Practice; its Distinctive Features Shown by its Statutes, Judicial Opinions and Illustrative Facts 3 (1853), *microformed on* 19th Century Legal Treatises Nos. 27329-27333 (Research Publications 1987).

[31] *Id.*

[32] Eric Foner, Gateway to Freedom: The Hidden History of the Underground Railroad 200–205 (2015).

[33] *The Disruption of Family Ties*, Antislavery Record 9 (Mar. 1836); Ronald G. Walters, The Antislavery Appeal: American Nationalism After 1830, at 91-92, 95 (1976); Petition, dated May 25, 1774, to the Governor, the Council and the House of Representatives of Massachusetts, *reprinted in* Herbert Aptheker, A Documentary History of the Negro People in the United States 8-9 (1969).

[their] freedoms" petitioned the Massachusetts legislature demanding the liberty to fulfill Christian familial obligations. "How," they asked, "can a husband leave master and work and cleave to his wife? . . . How can the wi[ves] submit themselves to husbands in all things?"[34] The remedy was clear: "[S]laves must be immediately recognized as human beings by the laws, their persons and their rights must be protected. Provisions must be made to establish marriage among them."[35]

As the institution of slavery began to crumble, the right to marry was enthusiastically seized by former slaves, not only for its private meaning, but also for its social meaning.[36] By formalizing family relationships, African-Americans consciously claimed the status and responsibilities of spouse, of parent, and of citizen. The formation of legally recognized marriage bonds marked them as human beings and members of the political community, rather than as chattel.

The rush of former slaves to take a place in the American political community by forming marriages under American law resonates with the rush of many gay and lesbian couples to legalize their commitments when same-sex marriage bans are overturned. Like the nearly 4,0000 same-sex couples who thronged to San Francisco during a one-month period in 2004 when same-sex marriage was newly (and briefly)

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[34] Paula Giddings, When and Where I Enter: The Impact of Black Women on Race and Sex in America 60 (1984).

[35] S.F.D., *People of Color*, 1 New York's Freedom J. No. 7, p. 1 (Apr. 27, 1827).

[36] This process is well documented in Heather Andrea Williams, Help Me to Find My People: The African American Search for Family Lost in Slavery (2012).

available there,[37] former slaves rushed to legalize their partnerships as soon as legalization was possible. For many, it began on Civil War battlefields. In what W.E.B. Du Bois described as a labor strike against the slave system, blacks abandoned Confederate plantations and swarmed to Union camps.[38] Many traveled in families, for family members left behind were at risk of retaliatory abuse and eviction.[39] After a period of consternation, the Union army put the labor of these people to the service of the Union cause on the theory that they were "contraband."[40] When black enlistment was belatedly authorized, black regiments were created, consisting both of escaped slaves and of free blacks. As "contrabands" and free blacks became soldiers, they moved to claim rights of family and take their places as free citizens. As a

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[37] *Court Annuls San Francisco gay marriages*, ASSOCIATED PRESS (Aug. 12, 2004, 4:23 pm), http://www.nbcnews.com/id/5685429/ns/politics/t/court-annuls-san-francisco-gay-marriages/#.VO7YcxbF_Ec. Although the marriages were later invalidated, the number of couples who traveled to San Francisco in hopes that they would receive official recognition was significant. *See generally* Tiffany C. Graham, *Something Old, Something New: Civic Virtue and the Case for Same-Sex Marriage*, 17 UCLA Women's L.J. 53, 57 & n.17 (2008) (discussing the relationship between family recognition and participation in civic life); Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 Fordham L. Rev. 1617, 1642-43 (2001) (explaining that the care-giving function of a family unit nurtures civic virtue).

[38] W.E.B. Dubois, Black Reconstruction 1860-1880, at 57 (1935).

[39] 1 Freedom: A Documentary History of Emancipation 1861-1867, ser. 2 at 658 (Ira Berlin et al. eds., 1982) [hereinafter A Documentary History].

[40] 3 A Documentary History, *supra* note 35, ser. 1 at 625-26 (1990).

result, in 1865, before passage of the Thirteenth Amendment, Congress passed and President Lincoln signed a bill freeing the families of black Union soldiers who had not been freed by the Emancipation Proclamation.[41] Military chaplains authorized to solemnize marriages between African-Americans, were innundated with requests. A Freedman's Bureau agent, who reported legalizing seventy-nine marriages in a single day, quoted the response of a black soldier whose character was such "that every word had power":[42]

> Fellow Soldiers: *I praise God for this day*! I have long been praying for it. The Marriage Covenant is at the foundation of all our rights. In slavery we could not have *legalised* marriage: *now* we have it. Let us conduct ourselves worthy of such a blessing – and all the people will respect us – God will bless us, and we shall be established as a people.[43]

The chaplain of a Mississippi Black Regiment reported the legalization of forty-three marriages, saying "I think I witness a very decided improvement in the social and domestic feelings of those married by the authority and protection of Law. It causes them to feel that they are beginning to be regarded and treated as human beings."[44] The chaplain of an Arkansas Black

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[41] Amy Dru Stanley, *Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage and Inviolate Human Rights*, 115 Am. Hist. Rev. 332 (2010).

[42] 1 A Documentary History, *supra* note 35, ser. 2 at 672.

[43] *Id.*

[44] *Id.* at 604.

Regiment reported registration of twenty-five marriages during the month of January 1865 alone.[45] He added, "The Colored People here, generally consider, this war not only their *exodus*, from bondage; but the road, to Responsibility; Competency; and an honorable Citizenship. . . ."[46]

II. SECURING THE RIGHT OF MARRIAGE RECOGNITION WAS AN EXPLICIT OBJECTIVE OF THE FOURTEENTH AMENDMENT'S FRAMERS

The legislators who drafted and approved the Fourteenth Amendment had lived through a passionate national debate over slavery and a prolonged and bloody civil war fought, ostensibly if not entirely,[47] to resolve the slavery question. Like all politically conscious Americans, federal legislators had been bombarded with stories of slavery's denial of formal family ties and its brutal disregard of extra-legal kinship. Members of the Reconstruction Congress also knew that despite emancipation, rights of family remained fragile in the former Confederacy. As Carl Schurz reported to Congress, southern whites still had "an ingrained feeling that the blacks at large

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[45] *Id.* at 712.

[46] *Id.*

[47] DuBois writes that "[t]he duty then of saving the Union became the great rallying cry of [the] war . . . . The only thing that really threatened the Union was slavery and the only remedy was Abolition." Dubois, *supra* note 34, at 56. For other analyses of the causes of the Civil War, see James Mcpherson, Battle Cry of Freedom: The Civil War Era 36 (1988); Shelby Foote, The Civil War: A Narrative (1974).

belong[ed] to the whites at large."[48] Schurz used the example of a southern planter to describe how the deeply engrained habit of regarding black people as property rather than as free citizens persisted:

> As to recognizing the rights of freedmen to their children, I will say there is not one man or woman in all the South who believes they are free, but we consider them as stolen property – stolen by the bayonets of the damnable United States government.[49]

Working with an awareness of the notorious and continuing deprivation of African-American family integrity, members of Congress repeatedly acknowledged during debates over the Reconstruction Amendments and related legislation that freedom required restoration of family rights. We include here a representative sample of their remarks.[50]

Senator Clark declared that slavery had "practiced concubinage, destroyed the sanctity of marriage, and sundered and broken the domestic ties."[51] Representative Broomall pronounced it,

> strange that an appeal should be made to humanity in favor of an institution which allows the husband to be separated from the wife, that allows the children to be taken from the mother;

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[48] Dubois, *supra* note 36, at 136 (quoting S. Exec. Doc. No. 2, 39th Cong., 1st Sess., Report of Carl Schurz (1865)).

[49] *Id.* at 142 (quoting Report of the Joint Committee on Reconstruction, Part II, 39th Cong., 1st Sess. 1866).

[50] For a more comprehensive account, see Peggy Cooper Davis, *Neglected Stories*: The Constitution and Family Values 38-40, 112-17 (1997).

[51] Cong. Globe, 38th Cong., 1st Sess. 1369 (1864).

> ah! that allows the very children of the deceased slaveholder himself to be sold to satisfy his merciless creditors.[52]

In response to the claim that slavery had biblical or divine sanction, Representative Shannon asked, "What divinity [is there] in tearing from the mother's arms the sucking child, and selling them to different and distant owners?"[53] Senator Harlan spoke of "incidents of slavery" that did violence to divine law. The first mentioned were denials of the rights to marry and to parent: "[I]n none of the slave States . . . was [the marriage] relation tolerated in opposition to the will of the slaveowner; and . . . in many of them . . . it . . . was prohibited absolutely by their statute laws."[54] Senator Sumner asked his colleagues to imagine an extraterrestrial visitor beholding the spectacle of slavery: "[A]stonishment . . . would swell into marvel as he learned that in this Republic . . . there were four million human beings in abject bondage, degraded to be chattels . . . despoiled of all rights, even the . . . sacred right of family."[55] Representative Kelly borrowed language from 1780 legislation abolishing slavery in Pennsylvania to say that enslaved African-Americans had been "deprived . . . of *the common blessings that they were by nature entitled to* [and] . . . cast . . . into the deepest afflictions, by an unnatural separation and sale of husband and wife from each

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[52] Cong. Globe, 38th Cong., 2d Sess. 221 (1865).

[53] Cong. Globe, 38th Cong., 1st Sess. 2948 (1864).

[54] *Id.* at 1439 (statement of Sen. Harlan).

[55] *Id.* at 1479.

other and from their children. . . ."[56] Congressman Creswell reminded the House that:

> [t]he slave could sustain none of those relations which give life all its charms. He could not say my home, my father, my mother, my wife, my child, my body. It is for God to judge whether he could say my soul. The law pronounced him a chattel, and these are not the rights or attributes of chattels.[57]

In response to the slaveholders' claim of vested rights in their slave property, Congressman Farnsworth exclaimed,

> Vested rights! What vested rights so high or so sacred as a man's right to himself, to his wife and children, to his liberty, and to the fruits of his own industry? *Did not our fathers declare that those rights were inalienable?*[58]

Congressman Kasson identified the marital relation, the parental relation, and the right of personal liberty as the "three great *fundamental natural rights of human society*" and pronounced them inalienable.[59] Expressing faith that freedom encompassed rights of family integrity, Senator Wilson declared that upon ratification of the Thirteenth Amendment, "[t]he sharp cry of the agonizing hearts of severed families

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[56] *Id.* at 2984 (emphasis added).

[57] Cong. Globe, 38th Cong., 2d Sess. 120 (1865) (statement of Rep. Creswell).

[58] Cong. Globe, 38th Cong., 2d Sess. 200 (1865) (emphasis added).

[59] *Id.* at 193 (emphasis added).

[would] cease to vex the weary ear of the nation . . . ."[60] During a discussion of civil rights legislation, Senator Trumbull offered an amendment to make former slaves citizens.[61] His subsequent remarks describe the intended scope of the rights to be conferred:

> It is difficult, perhaps, to define accurately what slavery is and what liberty is. Liberty and slavery are opposite terms; one is opposed to the other. . . . Civil liberty . . . is thus defined by Blackstone: "Civil liberty is no other than natural liberty, so far restrained by human laws and no further, as is necessary and expedient for the general advantage of the public." *That is the liberty to which every citizen is entitled.*[62]

When consideration of the Trumbull amendment resumed on the following day, Senator Howard responded to colleagues who claimed that Congress lacked the authority to enforce general citizenship rights on behalf of freedmen. In doing so, he spoke specifically of rights of home and family:

> [The slave] had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife, or even for friend. . . . What definition will you attach to the word "freeman" that does not include these ideas?[63]

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[60] Cong. Globe, 38th Cong., 1st Sess. 1324 (1864) (emphasis added).

[61] Cong. Globe, 39th Cong., 1st Sess. 474 (1866).

[62] *Id.* (emphasis added).

[63] *Id.* at 504.

Citizenship and all of its privileges and immunities were indisputably conferred with ratification of the 14th Amendment.[64] As we shall see, there was no dispute that this conferral encompassed a right of marriage recognition.

III. WITH PASSAGE OF THE THIRTEENTH AND FOURTEENTH AMENDMENTS EXTENSION OF THE RIGHT OF MARRIAGE RECOGNITION WAS PRESUMED TO BE REQUIRED IN EVERY STATE

As we discussed in Section I of our Argument, the laws of every slave-holding state, including the eleven states of the former Confederacy, made it impossible for a slave to enter a legally-binding marriage. Upon emancipation, however, the former Confederate states recognized that "domestic relations of that class of persons who have been recently released from the condition of slaves and given the rights and privileges of free persons" was "of great importance."[65] In response, they found that, "justice and humanity, as well as sound public policy, demanded legislation giving legal sanction, as far as possible, to the moral obligations of [former slave marriages], and rendering legitimate the offspring thereof."[66]

Accordingly, between 1865 and 1870 all eleven states of the former Confederacy revised their laws to

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[64] U.S. Const. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.")

[65] *McReynolds v. State*, 45 Tenn. 18, 20 (1867).

[66] *Jennings v. Webb*, 8 App. D.C. 43, 54 (1896).

recognize marriages between former slaves.[67] The mechanism for recognizing former slave marriages varied from state to state. Some states, like Tennessee,[68] Virginia,[69] and South Carolina,[70] considered the marriage right to vest automatically in couples who had entered customary slave marriages, so long as the couple continued to cohabitate after both partners had been emancipated. North Carolina[71] and Louisiana[72] required that the partners declare their intent to be married before a public official. Some states made the marriage right available retroactively, recognizing even those marriages that had dissolved before emancipation, legitimizing the children of those marriages, and protecting their inheritance rights.[73]

As the reactions of the formerly Confederate states show, the right to marry was not only incompatible

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[67] *See* Goring, *supra* note 20, at 316 n. 87, 316 n.100, 324 n.123, 325 n.127, 326 n.131, 331 n.167, 332, 334 n.185, 335 n.193 & 336 n.196 (compiling Tennessee (1866), Louisiana (1868), Virginia (1866), South Carolina (1865, modified in 1872), North Carolina (1866), Florida (1866), Arkansas (1866), Mississippi (1865), and Georgia (1866) statutes respectively); Washington, *supra* note 3 (describing Alabama (1865) and Texas (1870) statutes).

[68] *See, e.g.*, *Goring*, supra note 20, at 316.

[69] *Id.* at 324–25 n.123.

[70] *Id.* at 326 n.131.

[71] *Id.* at 331 n.169.

[72] Although the Act of 1868 provided that "slave couples were required to acknowledge their moral marriage before a notary public or other authorized governmental entity before 1870, Goring, *supra* note 20, at 322, Louisiana courts recognized marriages between former slaves who had failed to do so. *Succession of George Devezin*, 7 Teiss 111, 114 (La. Ct. App. 1910).

[73] *See, e.g.*, Goring, *supra* note 19, at 326–27 (discussing the retroactive application of South Carolina's act legalizing certain marriages).

with slavery, but also requisite to citizenship. Accordingly, the highest court in our nation's Capitol created an enhanced presumption of legitimacy when retroactively examining slave marriages. Holding that any set of circumstances giving rise to the inference of actual marriage among white persons, should operate similarly, if not more strongly, when experienced by former slaves, the court wrote: "The liberality of the presumption, that may be indulged in a case of this kind, beyond that in the case of free white people, has a foundation in reason as well as in natural justice."[74]

CONCLUSION

Judges considering marriage rights cases have frequently analogized the failure to recognize same-sex marriages and the prohibition of miscegenation.[75] An analogy with the denial of slave marriages is even more apt, for the denial of marriage rights goes beyond the insult of segregation to the indifference of exclusion. To bar a group altogether from an institution as central to civic and social life as marriage is akin to imposing the social death that isolated slaves from the body politic. Both exclusions are "rooted in a fundamental refusal to provide social recognition to the humanity" and dignity of the excluded

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[74] *Jennings v. Webb*, 8 App. D.C. 43, 56 (1896).

[75] *Bishop v. Smith*, 760 F.3d 1070, 1113 (10th Cir. 2014); *Latta v. Otter*, 771 F.3d 456, 478 (9th Cir. 2014) (Reinhardt, J., concurring); *Baskin v. Bogan*, 766 F.3d 648, 666 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir. 2014); *Hamby v. Parnell*, No. 3:14-CV-00089-TMB, 2014 WL 5089399, at *5 (D. Alaska Oct. 12, 2014); *Rosenbrahn v. Daugaard*, No. 4:14-CV-04081-KES, 2015 WL 144567, at *7-8 (D.S.D. Jan. 12, 2015); *Campaign for S. Equal. v. Bryant*, No. 3:14-CV-818-CWR-LRA, 2014 WL 6680570, at *13-14 (S.D. Miss. Nov. 25, 2014).

group.[76] Both are resisted in order that the excluded group might acquire the measure of civil and political autonomy appropriate to a scheme of ordered liberty. The fundamental human right to own and define ourselves and to exercise moral autonomy is justly limited to prevent tangible harms to others or to achieve material advances of the common welfare. It should never be limited for the purpose of imposing a majoritarian choice about the beauty, morality, or religious acceptability of a particular family form.[77]

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[76] Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender Race & Just. 105, 108, 147 (2009) ("[W]hite society faced no greater obstacle to recognizing marriage for newly-emancipated slaves than the belief best expressed by Thomas Jefferson that African American [intimate] relationships were based on 'eager desire.'"). To recognize a people's marriages is, rather, to appreciate the depth and complexity of their life partnerships. *Turner v. Safley*, 482 U.S. 78, 95 (187) (describing marriage as an expression "of emotional support and public commitment" and an aspect of religious life).

[77] *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.").

APPENDIX

APPENDIX

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